BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF THE DENIAL OF A SUBSTANTIAL DEVELOPMENT PERMIT TO MALONEY, HERRINGTON, FREESZ AND LUND BY THE CITY OF SEATTLE	
MALONEY, HERRINGTON, FREESZ AND LUND and SEATTLE-FIRST NATIONAL BANK, Appellants, v. CITY OF SEATTLE, Respondent.	SHB No. 190 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the denial of a substantial development permit, was brought before the Shorelines Hearings Board, Chris Smith, Chairman, Walt Woodward, Ralph A. Beswick, Robert E. Beaty, and Gordon Y. Ericksen on September 17 and 18, 1975 in Seattle, Washington. Hearing Examiner David Akana presided.

Appellants, Maloney, Herrington, Freesz and Lund and Seattle-First National Bank, were represented by William T. Christian; respondent,

City of Seattle, was represented by Lawrence K. McDonell, Assistant Corporation Counsel. Olympia court reporter, Sherri Darkow, recorded the proceeding.

Having heard the testimony or read the transcript, having examined the exhibits, having considered the contentions and the post hearing briefs submitted by each party, and the Board having received respondent's exceptions to its proposed Order, and having considered said exceptions, and said exceptions being granted in part and denied in part, the Shorelines Hearings Board makes the following

FINDINGS OF FACT

I.

In March, 1975, Maloney, Herrington, Freesz and Lund, architects for Seattle-First National Bank, applied for a substantial development permit from respondent City of Seattle for the construction of a 27 foot by 29 foot reinforced concrete helicopter landing pad (helistop) located on the roof of Seattle-First National Bank's (hereinafter referred to as appellant) computer center building. The proposed development consists only of the landing pad. The building is located partially within the shorelines of Lake Union.

II.

The building upon which the helistop is to be sited lies within an area zoned manufacturing. The surrounding area is principally zoned manufacturing in all directions and for the most part consists of manufacturing plants and commercial establishments, although three small apartment houses and 15 single family and duplex residential structures are in the vicinity.

III.

Under Seattle's zoning code, the existing seaplane bases in the shoreline of Lake Union are non-conforming uses. (TR 2, page 4) The Seattle Police Department has helicopter facilities within the shoreline at the north end of Lake Union. A shoreline substantial development permit was granted "two or three years ago" for the remodeling and enlargement of the City's helicopter and boat harbor patrol facility. (TR 2, page 12) The underlying zoning at appellants' site permits aircraft facilities.

IV.

The helistop would be used to expedite the receipt and delivery of bank documents between the computer center and out-of-town banks, particularly those located on the Olympic penninsula.

V.

On April 4, 1975 respondent's Department of Community Development (DCD) issued a Declaration of No Significant Impact (DNSI) concluding therein that the proposed action would not have a significant adverse effect on the environment. As a basis for the decision, two flights per day, a take-off in the morning and a landing in the evening, was assumed. By a letter dated April 30, 1975 appellant made clear that it intended four flights each day, one landing and take-off in the morning and one landing and take-off in the evening. Respondent's Exhibit 16. The DNSI was not withdrawn by respondent.

VI.

On May 21, 1975 a public hearing was held on the proposed development at which input opposing the proposed development from members of

the public was received. On June 5, 1975 DCD determined that the proposed development was not consistent with Section 4 of Seattle Ordinance 100423 (implementing the Shoreline Management Act of 1971), with Seattle Resolution 24283 (2000 Goals) and Resolution 24419 (Goals and Policy, City of Seattle Master Shoreline Program). Weighing heavily in that determination was the conclusion that the "residentially-zoned community . . . would be adversely impacted by the noise generated by the proposed facility." Appellant's Exhibit "E." By a letter dated June 9, 1975 from the Department of Buildings, appellant was informed of the City's decision to deny the application. The decision was based upon the recommendation of DCD that the proposed helistop was not consistent with Section 4 of Ordinance 100423. Appellant's Exhibit "F." Appellants thereafter made their timely appe to this Board.

VII.

Lake Union is extensively used by water-based aircraft. Police helicopters are used to monitor land and water vehicular traffic.

VIII.

The fourth draft of respondent's shoreline master program was ascertainable at all relevant times during the pendency of appellant's application. The draft master program was not officially adopted by the City of Seattle. Section 5.4.23 of said document provides:

> (a) Land based aircraft facilities are prohibited in all shoreline environments.
>
> (b) Float or seaplane facilities will be authorized only if the impact of the operation will be compatible with surrounding uses.

IX.

There is no evidence in the record relating to the contents of the first, second and third drafts of the Seattle Master Program nor how land-based aircraft facilities are treated therein.

X.

The author of respondent's DNSI asserted that he had made certain mistakes with respect to noise impact in the document, and that he had based his decision assuming only one take-off and landing per day. (See Finding of Fact V). The author's testimony suggests that, because of the foregoing errors, little weight should be given to the DNSI.

XI.

The in-flight noise generated by appellant's helicopter would probably exceed the state noise standards (WAC 173-60-040) for approximately ten seconds four times a day. However, regulation of in-flight noise of aircraft is pre-empted by federal law.

XII.

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

II.

Respondent's criticism of its own DNSI at the hearing must be given little weight in light of the fact that the DNSI was never withdrawn. Had the erroneous factual matters considered by respondent been important respondent surely would have withdrawn its DNSI. It has not done so. Therefore, we hold that the DNSI is binding upon respondent.

In our analysis of the foregoing issue, we note that our analysis also comports with the recently promulgated final proposed guidelines of the Council on Environmental Policy whose purpose is to provide certainty. (chapter 197-10 WAC). We find the suggested interpretation of the State Environmental Policy Act (SEPA), chapter 43.21C RCW, to be illustrative of procedures necessary to enforce the statute. For authority for us to do so see No Oil v. Los Angeles, 7 ERC 1257, n.2 (S. Ct., Cal., 1974) wherein the court said that "we do not apply these guidelines retroactively to decisions . . . rendered before the guidelines went into effect. We make use of the guidelines, however, as a suggested interpretation of the statute, and as an illustration of the procedures which the . . . agency finds necessary to enforcement of the statute." The guidelines provide that a DNSI may be withdrawn under certain circumstances. Proposed WAC 197-10-375. If a DNSI is not withdrawn, it then becomes binding upon all agencies, including the issuing agency. Proposed WAC 197-10-390.

III.

RCW 90.58.140(2) provides in part:

> A permit shall be granted:
> (a) From June 1, 1971 until such time as an applicable master program has become effective, only when the development proposed

is consistent with: (i) The policy of RCW 90.58.020; and (ii) after their adoption, the guidelines and regulations of the department [of Ecology]; and (iii) so far as can be ascertained, the master program being developed for the area. . . .

IV.

RCW 90.58.020 provides in part:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for a limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto. [See also Section 3, Seattle Ordinance 100423.]

We conclude that no significant adverse non-exempt noise appears to result from the construction of the helistop. Because respondent's action with regard to appellant's application is based upon adverse noise concerns, and we have concluded otherwise, we further conclude that the proposed helistop is not inconsistent with RCW 90.58.020.

V.

The Department of Ecology guidelines do not specifically address airports or helistops. Under the facts of this case, they have not been shown to be applicable.

VI.

Shoreline permits shall be granted "only when the development is consistent with: (i) the policy of RCW 90.58.020 and . . . (iii) so far as can be ascertained the master program being developed for the area." (RCW 90.58.140.) (Emphasis supplied.)

We turn then to ascertaining the content of the master program as it relates to aircraft facilities. Unfortunately, as indicated in our Finding of Fact IX, there is no evidence in the record relating to the contents of the first, second, and third drafts of Seattle's master program, nor how land-based aircraft facilities are treated therein. The evidence reveals only the contents of the fourth draft of Seattle's master program in which there is a prohibition of land-based aircraft facilities within the shoreline. What use, if any, should be made to a draft of a proposed master program? The statutory language of RCW 90.58.020 describes a master program "being developed." It is significant that such language is in the present tense.

If the Legislature had intended that the developing master program of local government should not be utilized until it had been adopted by local government, the Legislature could have easily expressed that intent by using the words "developed by local government." Not having so limited the use of master programs, we conclude the Legislature intended that a broader meaning should be given. Further, the Act requires that it be "liberally construed to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900. Lastly, the Act contemplates that local government should have the primary duty of administering its provisions. Accordingly, we hold that it is proper for local governments and this Board to test a proposed substantial development permit for consistency with a draft master program which has not yet been adopted by the local legislative authority and that a permit may be denied when inconsistent with the draft even though the development be consistent with the underlying zoning ordinance

The prohibition of land-based aircraft facilities in the fourth draft of the master program is clear and succinct. Therefore, its provisions "can be ascertained" within the meaning of the statute. Since the appellants application and proposed use is inconsistent with "the master program being developed for the area," the permit must be denied.

Where there have been several drafts of proposed master programs wherein the subject of land-based aircraft facilities have been differently or inconsistently treated, little or no weight should be given to the last draft, short of its adoption by the legislative authority.

The master program must be consistent with the policy of the Act. (RCW 90.58.090(1)) In some factual circumstances, as in this case, the development is consistent with the policy of the Act and inconsistent with the master program or insofar as it is ascertainable. In those circumstances, the master program is not necessarily in violation of the consistency requirement of RCW 90.58.090(1). Why not? Because where a master program of local government is more restrictive than the policy, there is no inconsistency. If, however, the master program purports to allow developments within the shoreline which are prohibited by the policy, i.e., unreasonable and inappropriate uses (RCW 90.58.020 (2d para.)) such master program would be inconsistent with the policy and therefore invalid.

VII.

We hold that the proposed development is consistent with the policy of RCW 90.58.020 and the guidelines and regulations of the Department of Ecology (none applicable). We hold that the proposed development is